



September 20, 2012

Sue Fry
Bureau of Reclamation
Mid-Pacific Region
Area Manager, Bay-Delta Office
801 I Street, Ste 140
Sacramento, CA 95814

Dear Ms. Fry,

I am writing on behalf of the Coalition for Sustainable Delta (Coalition) with respect to the Science Review Component of the Remand Stakeholder Engagement Process (RSEP). The Coalition is a California nonprofit corporation comprised of agricultural, municipal, and industrial water users, as well as individuals in the San Joaquin Valley. The Coalition and its members depend on water from the Sacramento-San Joaquin Delta (Delta) for their continued livelihood. Individual Coalition members frequently use the Delta for environmental, aesthetic, and recreational purposes; thus, the economic and non-economic interests of the Coalition and its members are dependent on a healthy and sustainable Delta ecosystem. The Coalition takes great interest in efforts to manage Bay-Delta ecosystems and the desired and protected species that depend on those systems.

We understand that the Science Review Component document is intended to guide the reconsultation process under the Endangered Species Act (ESA) and the Bureau's effort to comply with the environmental review process under the National Environmental Policy Act (NEPA). The elements of the Science Review Component are intended to:

- identify a core set of scientific issues,
- identify a group of outside science experts,
- task outside science experts to review information regarding core issues with input from interested stakeholders and prepare concise, written reports on each core issue, and
- if the outside science experts recommend further review, consider such further review using an independent science review panel

Because the Bureau retains sole authority to define the core set of scientific issues and identify the outside science experts, we are concerned that the Bureau may not be able to meet its professed commitment to a process that is balanced, objective, open, and appropriately transparent. Our concern is compounded by that fact that in its notice of preparation (77 Fed. Reg. 18,858, 18,859 (Mar. 28, 2012)), the Bureau identified its

preferred alternative as implementation of “the operational components of the 2008 USFWS and the 2009 NMFS Reasonable and Prudent Alternatives.”

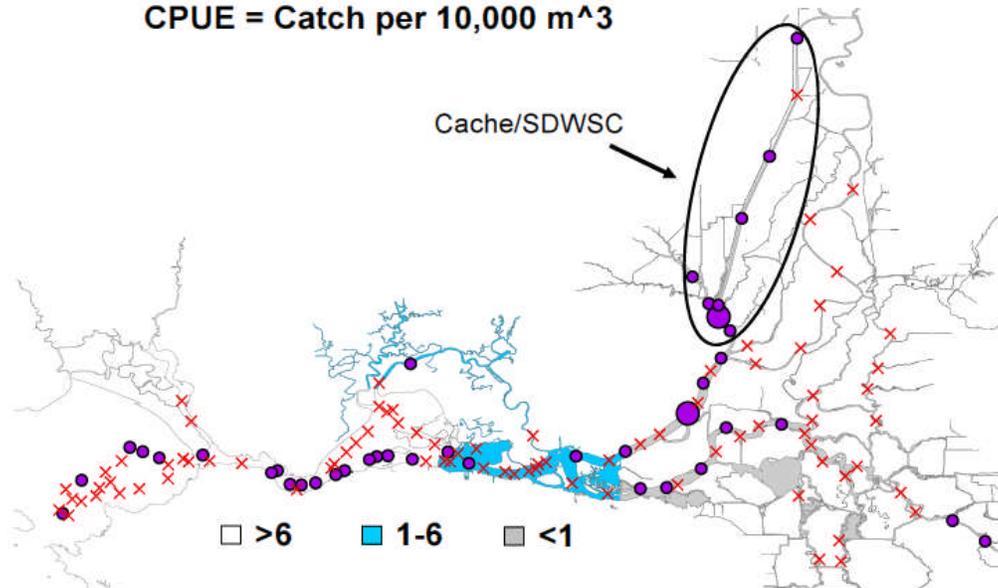
The Coalition intends to engage in the RSEP in good faith despite our concerns. That said, we intend to hold the Bureau to its commitment to a balanced, objective, open, and appropriately transparent process. **If the Bureau seeks to build trust with other stakeholders (including various federal and state agencies) through this process, it cannot act unilaterally to define the core scientific issues.** Furthermore, the Bureau should not define the issues in a manner that will impede or bias subsequent review.

One example of an issue that is consistently ill-defined is that concerning delta smelt habitat. In the 2008 U.S. Fish and Wildlife Service biological opinion, the Service claims X2 is a “surrogate indicator” for delta smelt habitat. The facts unequivocally refute this claim. The Service and other agencies including EPA have since abandoned this claim and instead argued that the low salinity zone (LSZ) from X1 to X6 represents the extent and quality of delta smelt habitat. Recent presentations by the California Department of Fish and Game show the presence of delta smelt well beyond the generally recognized low-salinity zone, and characterize the contemporary distribution of delta smelt as “centered” around the low-salinity zone, thereby clearly refuting the assertion that the LSZ is a surrogate for delta smelt habitat. The pertinent facts can be derived from mapping publically available data on the distribution of the fish and overlying it on the dynamic salinity gradient in the Delta. One such map that we believe summarizes distributional data for all or a portion of 2011 (the Department of Fish and Game did not fully annotate its presentation) was recently presented by the Department of Fish and Game to an independent science review panel (as is reproduced here, Baxter and Slater 2012). It demonstrates that delta smelt predominantly are present in areas well beyond the LSZ.

But rather than test these claims by validating whether the surrogates that have been proposed such to represent accurately the extent of delta smelt habitat, the Service has simply asserted and assumed that the surrogates are valid, and has implemented the so-called fall X2 action on the basis of its assertion and assumption. As a result, the agency has mis-defined the issue by skipping the essential first step (that is, whether X2 or the LSZ is a valid and robust surrogate for delta smelt habitat) and inappropriately proceeding to a later step (that is, can increased upstream releases result in an increase in the areal extent of X2 or the LSZ, which is assumed to be equivalent to an increase in delta smelt habitat).

Generalized Distribution

CPUE = Catch per 10,000 m³



Likewise, the Bureau cannot act unilaterally in selecting outside science experts. And it is imperative to ensure that the persons involved in the consultation – including preparation of the biological assessment and biological opinion – are not involved in the process of selecting experts to avoid the appearance of impropriety (Murphy and Weiland 2011). The existing description of the selection process does not enable stakeholders to ascertain its legitimacy.

This problem is compounded by the Bureau's suggestion at the September 7, 2012, meeting that it may limit its pool of candidates for appointment as experts to former Federal employees. In many cases, such persons will have an actual or potential conflict of interest. We are aware that the Bureau has circulated a list of potential experts to a subset of the stakeholders that includes a number of persons who should be excluded from consideration. For example, Dr. Wim Kimmerer and Dr. Pete Smith both should be excluded from consideration.¹ Dr. Kimmerer should be excluded because his analysis of the effects of entrainment on delta smelt (Kimmerer 2008), critical assessment of that analysis, and interpretation of it along with other lines of evidence played a central role in the prior consultation and almost certainly will again in the present consultation. He cannot reasonably be expected to critically assess his own analysis. Dr. Smith, a retired Department of the Interior employee, should be excluded because his analysis of the relationship between raw (versus scaled) salvage and Old and Middle (OMR) river flows

¹ To be clear, we are not suggesting that either Dr. Kimmerer or Dr. Smith lacks relevant expertise. Rather, we are pointing out that it would be inappropriate to expect them to undertake objective analyses of their own work.

Sue Fry
September 20, 2012
Page 4

was the lynchpin of the Service's determination to set a ceiling on OMR flows to protect delta smelt in its 2008 U.S. Fish and Wildlife Service biological opinion (FWS 2008, pp. 163-64).

In addition to these comments, we commend to you the comments of the water contractors. We thank you for giving full and deliberate consideration to our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'William D. Phillipmore', with a stylized flourish at the end.

William D. Phillipmore

Encl.

References

Baxter R. & S. Slater. 2012. Delta Smelt Distribution and Diet. Available from: http://deltacouncil.ca.gov/sites/default/files/documents/files/Baxter_Slater_Flash_DeltaScienceJuly2012_v2.pdf.

Kimmerer, W. 2008. Losses of Sacramento River Chinook Salmon and Delta Smelt to Entrainment in Water Diversions in the Sacramento-San Joaquin Delta. San Francisco Estuary and Watershed Science [Internet]. Available from: <http://escholarship.org/uc/item/7v92h6fs>.

Murphy, D.D. & P.S. Weiland. 2011. The Route to Best Science in Implementation of the Endangered Species Act's Consultation Mandate: The Benefits of Structured Effects Analysis, Environmental Management 47:161-172.

U.S. Fish and Wildlife Service (FWS). 2008. Biological opinion on the proposed coordinated operations of the Central Valley Project and State Water Project. Available from: http://www.fws.gov/sfbaydelta/documents/SWP-CVP_OPs_BO_12-15_final_OCR.pdf.